SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 192.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company,

Appellants,

vs.

TRUST COMPANY OF NORTH AMERICA,

Appellee.

STATEMENT OF THE CASE.

This case belongs to the class of cases in which the decree of the Circuit Court of Appeals is made final by statute and is brought to this Court by certiorari, and is now pending before this Court as if on appeal.

The Sioux City Terminal Railroad & Warehouse Company, called herein the Terminal Company, is an Iowa corporation, organized September 16, 1889. It purchased grounds for terminal facilities prior to January 1, 1890, and a portion of the same thereafter, and proceeded at or about said date to prepare said grounds for the laying of terminal tracks, and later, in 1892-3, built thereon its union depot.

Prior to January 1, 1890, the Terminal Company had executed its separate notes in the sum of $5,000 each, which were deposited with and negotiated by and under the endorsement of the Union Loan & Trust Company, of Sioux City, Iowa, note by note, to different banks and bankers throughout the country, mainly in the Eastern States, and for its endorsement and negotiation the said Trust Company received a small commission. The proceeds of these notes purchased the property of said Terminal Company, there being no cash received upon its stock, the entire authorized issue of which, $1,000,000, par value, was finally given to the Sioux City & Northern Railroad for the control of a few nominal franchises or rights of way upon certain streets and alleys, having no substantial value, but serving as a subterfuge under which to "issue" the Terminal stock.

The aggregate indebtedness represented by these different $5,000 notes, so negotiated to various and different parties throughout the country, was, on January 1, 1890, about $1,250,000. This amount was at different times more or less reduced, but the larger part of it, by renewals and substitutions, continued in the same form of these six months $5,000 notes until, at the time of the failure of the said Union Loan & Trust Company, which had negotiated the same under its endorsement and of which Appellant E. H. Hubbard became assignee for the benefit of creditors on the 25th day of April, 1893, there was outstanding of these $5,000 notes the aggregate sum of $718,000. In reference to this note indebtedness, it is stipulated (Record, pp. 243-4) by the parties to this suit "that there are outstanding, due and unpaid notes of the Sioux City Terminal Railroad & Warehouse Company negotiated through the Union Loan & Trust Company under its en-

dorsement to the amount of $718,000," and in said stipulation these are further described as the notes to which reference will constantly be made in this brief, and including as a part thereof the notes purchased and herein represented by the Appellant Credits Commutation Company, which subsequently to 1893 became the owner of $616,500 principal of said outstanding notes, and on July 23, 1895, reduced the same to judgment against said Terminal Company for the amount of said principal, $616,500, and interest, $75,596.95, on which general execution was at once issued and returned wholly unsatisfied. Whereupon said Credits Commutation Company, judgment creditor, one of the appellants herein, intervened by express permission of Court in this suit which had been commenced in the preceding year, but which had not gone to decree.

The first twenty-four pages of the record herein have nothing to do with the issues on which this case was tried, and on which it is now presented. That attempted foreclosure in behalf of half dozen notes was immediately abandoned. The pleadings under which the issues presented to this Court were made, commence on page 25 of the record.

This suit, on the issues here presented, was independently brought by the Trust Company of North America to foreclose an alleged first mortgage executed by the Terminal Company upon all its properties, rights and franchises, dated January 1, 1890, and purporting to secure 1,250 bonds of the amount of $1,000 each, par value, of said Terminal Company, which bonds, to the amount of $1,000,000 were negotiated for substantial value in July, 1890, and the remaining $250,000 thereof were not sold until the summer of 1893, prior to which latter date the identical notes represented herein by Appellant

Credits Commutation Company, judgment creditor, were all actually outstanding.

The Terminal Company got the benefit of the proceeds of appellant's notes. Indeed, the proceeds of the earlier notes, herein retained by renewals and substitutions, purchased substantially all the property covered by the mortgage in controversy.

The negotiation of the notes took place in single transactions with separate parties, each note for $5,000, making no disclosure upon its face or otherwise of other notes or other indebtedness, and the validity of this indebtedness of appellant is admitted by stipulation in the record. (Record, pp. 243-4.)

Each mortgage bond (Record, p. 144), however, referred to the mortgage in controversy, and upon its face disclosed the fact that each bond was a part of an indebtedness aggregating $1,250,000, as a single transaction. The mortgage in suit also fixes the issue at the same amount. (Record, p. 143.)

The authorized capital stock of this Terminal Company was only $1,000,000, and the company was permitted (Record, p. 190) to commence business when only $200,000 of said capital stock had been subscribed. Only this last amount had been subscribed or issued at the date of the bonds and mortgage.

The charter of the said Terminal Company provided (Record, p. 191) that "the highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company."

The statute law of Iowa, Sec. 1611 of McClain's Code of Iowa, originally read thus:

> "Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock."

Chapter 22 of the laws of the 20th General Assembly, 1884, added the following proviso:

> "Provided, that the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this state, in aid of the location, construction and equipment of railways, to the amount of not exceeding sixteen thousand dollars per mile, single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped."

In 1886, Chapter 54 of the laws of the 21st General Assembly, made this further addition or second proviso, to-wit:

> "Provided, further, that the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of such debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon."

The Appellant Credits Commutation Company, judgment creditor, with the validity of its indebtedness admitted by adjudication and under stipulation in this suit, defends against the foreclosure of said mortgage,

and the establishment of the indebtedness purporting to be represented by the bonds securing the same, on several grounds, one of which is that the execution of said bonds and said mortgage and the incurring of said lump indebtedness of $1,250,000 in a single transaction were ultra vires and unlawful, because prohibited by the charter and also prohibited by the Iowa statute. The Terminal Company and other appellants make the same defense.

On the 23d day of December, 1893, the Terminal Company executed a trust deed (Record, pp. 233–242) to Appellant E. H. Hubbard, trustee, to secure the said notes of the said Terminal Company so outstanding under the endorsement of said Union Loan & Trust Company in the aggregate amount of $718,000, of which amount $616,500 are the identical notes represented herein by the Appellant Credits Commutation Company itself as judgment creditor. This trust deed is not subject to the alleged mortgage to the Trust Company of North America.

The Circuit Court on the hearing, in so far as the statements made at the time thereof may be used as a criterion, seemed to favor the contention of these appellants, but in the decision of that Court, the mortgage and bonds in controversy were sustained under a construction of the statute of Iowa (69 Fed. Rep., 441), applying to said bonds and mortgage the second proviso above quoted, which construction has since met the express disapproval of the Supreme Court of Iowa (76 N. W. R., 688), and we are informed by appellee, will be expressly abandoned at this hearing.

The Circuit Court of Appeals (82 F. R., 124; Record, pp. 288-303), for the purpose of its decision, conceded that the bonds and mortgage did not fall within the

second proviso of the statute, and rested its decision upon an entirely different ground from that of the Circuit Court, to-wit: upon the ground that he who seeks equity must do equity, and, therefore, the mortgage and bonds in controversy could not be thus defended against while the proceeds are retained by the Terminal Company, and that neither Hubbard, trustee, nor the Credits Commutation Company, judgment creditor, had any better standing to assail the mortgage and bonds than had the Terminal Company itself.

SPECIFICATION OF ERRORS RELIED UPON.

The appellants severally and separately, each for himself, and not jointly with one another, assigned (pp. 272-280) and in this Court rely upon the following errors:

2. Because the Court erred in not decreeing that said trust deed purporting to be made by the said Sioux City Terminal Railroad and Warehouse Company to said Trust Company of North America, dated January 1, 1890, and all the bonds purporting to be secured thereby were each and all null and void, for that (a) the indebtedness represented by said bonds and trust deed, as a single indebtedness disclosed upon the face of each bond, exceeded in amount two-thirds of the capital stock of said Sioux City Terminal Railroad and Warehouse Company; (b) The Articles of Incorporation and notice thereof of the said Sioux City Terminal Railroad and Warehouse Company expressly limit the indebtedness to two-thirds of the paid-up capital stock of said Sioux City Terminal Railroad and Warehouse Company; (c) at the time of the execution of said mortgage there was no paid-up capital stock and only two hundred thousand dollars par value of said stock subscribed; (d) the total authorized capital

stock of said company never exceeded one million dollars; (e) the laws of Iowa prohibit the incurring of so large an indebtedness by said Sioux City Terminal Railroad and Warehouse Company; (f) the pleadings in this case did not permit a recovery under any substituted equity but rest the recovery only upon the bonds and trust deed as contracts and as such they are invalid and void; (g) the said Trust Company of North America and each holder of said bonds from the first has had full knowledge and notice of the facts rendering the same ultra vires and void and were participants therein and acted in pari delicto.

3. Because the Court erred in decreeing that said alleged bonds were secured by a valid trust deed to the Trust Company of North America upon either the real estate, personal property or franchises of the said Sioux City Terminal Railroad and Warehouse Company.

4. Because the Court erred in not decreeing said bonds and trust deed from said Sioux City Terminal Railroad and Warehouse Company to said Trust Company of North America invalid and void and of no force and effect and constituting no lien upon any of the properties, real estate or personal, of the said Sioux City Terminal Railroad and Warehouse Company.

15. Because the Court erred in decreeing that the Sioux City Terminal Railroad & Warehouse Company should, on or before the 1st day of December, 1895, pay into said Court or into the hands of the depositary to be named by said Court to the credit of this suit the full sum of one million two hundred fifty thousand dollars, with interest thereon at the rate of six per cent. from the 1st day of July, 1893, until the said payment is made for the use and benefit of all the holders of said bonds and coupons purporting to be issued under the said alleged trust deed of January 1, 1890.

16. Because the Court erred in decreeing that in default of such payment on or before the 1st day of December, 1895, the said Sioux City Terminal Railroad & Warehouse Company and all parties claiming under it since the execution of said trust deed of January 1, 1890, should be barred and foreclosed of all equity of redemption in said mortgaged premises, property, rights, assets, franchises, leases and contracts described or embraced in said alleged trust deed of January 1, 1890, and every part and parcel thereunder.

17. Because the Court erred in decreeing that in default of such payments on or before the 1st day of December, 1895, all of said mortgaged property should be sold, either as in said decree stated or otherwise.

23. Because the Court erred in decreeing that said bonds and coupons purporting to be secured by the said trust deed to the Trust Company of North America, were entitled to be paid out of the proceeds of the sale of said properties before any payments were made to these appellants or either of them.

24. Because the Court erred in decreeing that said bonds and coupons should be paid in full out of the proceeds of said sale.

25. Because the Court erred in decreeing that the said bonds purporting to be secured by said trust deed of January 1, 1890, to the Trust Company of North America, and overdue coupons belonging thereto, should be received by said master on account of amounts to be paid on the purchase of said mortgaged premises.

26. Because the Court erred in decreeing that the entire funds to arise from the sale of said premises after paying the costs of said suit and the expenses of said

administration of said estate and foreclosure as shown in Division 1 of paragraph 7 of said decree, and depositing said eighty thousand dollars reserved to protect said mechanic's liens, should be applied by the master to the payment of all of said bonds and unpaid coupons thereon, with interest accruing thereon and to accrue thereon, in full or ratably if said funds should not be sufficient to pay said bonds and coupons in full.

27. Because the Court erred in decreeing that in case said fund is not sufficient to pay the said bonds and coupons with interest in full, the said deficiency should be reported to said Court by said master, and thereupon the Trust Company of North America should recover from the Sioux City Terminal Railroad & Warehouse Company a judgment for the amount of such deficiency.

28. Because the Court erred in decreeing that said alleged bonds were all outstandig, due and unpaid, together with interest from July, 1, 1893.

33. Because the Court erred in not decreeing that the conveyance made by said Sioux City Terminal Railroad & Warehouse Company to said E. H. Hubbard, trustee, after re-entry by said company for breach of condition of lease of its property to the said Sioux City & Northern Railroad Company, be sustained as passing a free and unincumbered lien, title and possession of all and singular the property of said Sioux City Terminal Railroad & Warehouse Company to said Hubbard for the purposes as in said trust declared.

34. Because the Court erred in not giving the possession and the rents and profits of the property to E. H. Hubbard, trustee.

35. Because the Court erred in not decreeing the interest and lien of E. H. Hubbard, trustee, in and upon the properties of said Sioux City Terminal Railroad & Warehouse Company and the assets thereof, superior to the interest and lien of the said Trust Company of North America.

36. Because the Court erred in not decreeing the lien or claim of the Credits Commutation Company a first and paramount lien or claim on the property and assets of the said Sioux City Terminal Railroad & Warehouse Company, and to be first paid out of the proceeds thereof.

37. Because the Court erred in not decreeing the right, lien and interest of said Credits Commutation Company upon the property and assets of said Sioux City Terminal Railroad & Warehouse Company in priority of and superior to the lien, interest or right of the said Trust Company of North America.

38. Because the Court erred in not permitting the Credits Commutation Company, judgment creditor, and Hubbard, trustee either or both, to share at least pro rata with said Trust Company of North America in the proceeds of the sale of said Sioux City Terminal Railroad & Warehouse Company properties and assets.

39. Because the Court erred, even if priority should not be given to the claim of said Credits Commutation Company in the amounts of its said judgment as shown by the certified copy thereof offered in evidence and attached to its petition of intervention, in not decreeing that the properties, real, personal and mixed, of the said Sioux City Terminal Railroad & Warehouse Company, described in said trust deed to said Trust Company of North America, or otherwise, or the proceeds thereof, be held or applied for the use and benefit of the claim of

said Credits Commutation Company, or said Hubbard, trustee, either or both, in priority of the claim of said Trust Company of North America, or ratably with the claims of said Trust Company of North America, made in behalf of said alleged bonds, share and share alike.

BRIEF OF THE ARGUMENT.

The Mortgage to the Trust Company of North America and the Bonds Purporting To Be Thereby Secured Are Absolutely Void, for that upon Their Face They Are Both Ultra Vires the Corporation and Unlawful.

FIRST POINT.

THE BONDS AND MORTGAGE IN CONTROVERSY EVIDENCE AN INDEBTEDNESS WHICH IS PROHIBITED BY THE CHARTER OF THE TERMINAL COMPANY, AND, THEREFORE, SAID INDEBTEDNESS, AND THE BONDS AND MORTGAGE EVIDENCING THE SAME, ARE ULTRA VIRES THE CORPORATION AND ABSOLUTELY VOID.

Opposing counsel, in his brief resisting the petition for certiorari herein (p. 11), thus expressed his contention:

> "If, in the exercise of that act it (Terminal Co.) violated the laws of the state or its charter, its acts in that respect might be voidable, and whether or not they would be declared void would depend upon the equities of the case and whether or not justice could be done to all parties under such a holding."

At the outset, let us emphasize our contention that this was not an authorized contract performed in an unauthorized manner. It was incapable of authorization, offending alike against the charter and the statute to the equal knowledge of all parties and absolutely void.

The charter of the Terminal Company provided (Record, p. 191) that "the highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company." The words, "aside from the indebtedness secured by mortgage upon the real estate of the company," are unavailing to the appellee for any purpose in that in so far as it might be claimed that they permitted an increase of indebtedness beyond the two-thirds limit, they offend against the statute of Iowa, and, therefore, can have no force or effect. This provision of the charter had already exhausted the utmost statutory limit. While the language of the charter might have fixed the debt limit at less than the statutory limit, no charter can by any of its provisions increase the debt limit beyond the statutory limit. A corporation cannot enlarge its powers beyond those granted by the laws under which it was organized by claiming greater powers in its Articles of Incorporation.

5 Thompson on Corporations, Sec. 5996.

S. C. T. R. & W. Co. vs. Trust Co., 82 F. R., 133.

In express language, therefore, the Terminal charter absolutely prohibits the Terminal Company from incurring any indebtedness at any time in excess of two-thirds of the paid-up capital stock. Without at this time making distinction between "paid-up" and "authorized" capital stock, it is conceded that the charter of the Terminal Company authorized only one million dollars of capital stock, and two-thirds of this amount would represent the extreme limit of corporate power as applied to the incurring of indebtedness.

Each bond and the mortgage upon their face disclose, in a single transaction, the incurring of a lump in-

debtedness of $1,250,000, or twice as large as the corporation might lawfully incur. The Circuit Court of Appeals correctly found that appellee and the bondholders "had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being." These admitted facts would clearly seem to make this contract—these bonds and this mortgage—ultra vires the corporation. This is not a question of the irregular exercise of power, nor of the failure to make a contract in a prescribed way or under authorized or possible formalities; but the question here presented rests upon the absolute want of power in the corporation itself, no matter what form of procedure it might have taken to do the act. This contract, this single indebtedness, in and of itself violated and upon its very face disclosed the violation of the plain prohibition of the corporate charter. This contract involved the exercise of a power expressly excluded by the terms of the charter. The corporation could not make this contract at any time, nor under any circumstances or formalities, without violating the prohibition of its charter and assuming the exercise of a power expressly excluded under the very law of its being.

The Circuit Court of Appeals thought "the creation of the debt and mortgage were not without the general scope of its powers, but they were the result of an excessive exercise of one of those powers." The contract, evidenced by this mortgage and these bonds, is not a misuse of legal power, nor the abuse of legal power, but an attempted exercise or usurpation of power not possessed, a power purposely and expressly excluded by a prohibition in the corporate charter. It is a contract that the corporation could not make at any time, nor under any circumstances, nor in any way, nor for any purpose—

a contract for which legal power never existed. The exercise of a prohibited power cannot be the excessive exercise of a power possessed.

The creation of this indebtedness of a million and a quarter dollars, as a single transaction, was certainly without the general scope of the corporate powers. These bonds were not within the general scope of corporate power because there were no legal formalities that the corporation could have complied with that would have made them valid.

> "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with."

Cent. Transp. Co. vs. Pull. Car Co., 139 U. S., 24.

This contract contravenes, to the active knowledge and participation of all parties, not only public policy as expressed in statute law and the statute law itself, but also the prohibition of the charter, the very law of corporate being.

> "The law is the same whether the corporation is created by a special act of the legislature or under general laws by recording and filing the required Articles of Incorporation. Any person dealing with such a corporation is bound to take notice of the documents recorded or filed upon which as authorized and controlled by the general laws, depends the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation."

McCormick vs. Market Nat. Bk., 165 U. S., 550.

"This rule (that the lender may assume proper authority), however, does not apply where the power of the company itself as distinguished from that of its directors, is limited in point of amount; in such a case the lender is not entitled to assume that the prescribed amount is not being exceeded."

Robbins' Law of Mortgages, p. 474; citing cases.

"And if a limited power is conferred upon a society by its rules, the limits so prescribed ought not to be exceeded, and any borrowing in excess of the limits is wrongful (p. 711). The acts of the directors would in no way give effect to that which was unlawful, nor in my opinion would the assent of every shareholder to the transaction make it binding upon the society. * * * *

If in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness." (P. 713.)

Chapleo vs. Brunswick Bldg. Soc., 6 Q. B. D., 696.

"Persons dealing with a corporation having a limited power of borrowing are put upon inquiry whether that limit is being exceeded. They intended to do a thing which was against the law. It matters not that they did not appreciate the fact."

Ex parte Watson, 21 Q. B. D., 305-306.

The following authorities, among others, apply the doctrine of ultra vires to excessive indebtedness, and would seem to be directly in point.

Lady Wenlock vs. River D. Co., 10 App. Cas., 354.

Chapleo vs. Brunswick Bldg. Soc., 6 Q. B. D., 696, C. A. (705, 711, 713, 715).

Ex parte Watson, 21 Q. B. D., 301, 305, 306.

Robbins' Law of Mortgs., p. 474.

It should be stated that the case of Lady Wenlock vs. River Dee Co., 10 App. Cas., 354, is cited with ap-

proval in the discussion of the doctrine of ultra vires in California National Bank vs. Kennedy, 167 U. S., 368.

We also call the Court's attention to the fact that on p. 711, of the Chapleo case, supra, the leading English case of Ashbury Ry. Carriage Co. vs. Riche, L. R. 7, E. & I., 672 (approved in 101 U. S., 83 and 139 U. S., 24), is cited to sustain the doctrine of ultra vires for excessive indebtedness. It is thus shown by the highest English authority that contracts ultra vires by virtue of excessive indebtedness are subject to the same principles as contracts ultra vires for any other reason, and the distinction sought to be made by Judge Sanborn is without foundation. The same is true of the Wenlock case, supra, which expressly rests on the Ashbury and Great Eastern cases.

In McPherson vs. Foster Bros., 43 Ia., 48, that Court considered a somewhat similar provision, and said:

> "There is no distinction in reason between the cases of an entire absence of enactment conferring power and a prohibition of its exercise beyond a certain limit. They are in fact one and the same case. In the first instance power is not granted, and is not, therefore, possessed. In the other it is expressly withheld, and its exercise prohibited, and is, therefore, not conferred. There is in each case a total absence of authority. (P. 58.) When the limitation is passed there is the same absence of power as though none had ever been conferred. Otherwise the condition in limitation would be without effect. (P. 59.) Power is not only withheld, but a prohibition is placed upon its exercise." (P. 63.)
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> "If the power conferred by a charter has been exhausted, then, in respect of any further exercise of it, the case stands as though it had never been granted."
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> 5 Thomp. Com. Corp., Sec. 5982.

"Of course when a charter power is once exhausted it is, in respect to other contracts and rights, as though it had never been granted."

East Tenn. &c., R. Co., vs. Frazier, 139 U. S., 288.

The Minnesota Supreme Court, in Kraninger vs. Peoples Building Society, 61 N. W. R., 904, held, page 906:

"But there can be no distinction in principle between a case where the charter, or articles of association, prohibit a thing altogether, and where it is prohibited beyond a certain limit. In the one case, there is a total absence of authority to do the thing at all, and in the other, a total absence of authority to do it beyond a certain limit, and after that limit is reached there is as much an absence of authority in the latter case as there was in the former."

In Scovill vs. Thayer, 105 U. S., 143, this Court held that the stock issued by a corporation in excess of the limit fixed by its charter was ultra vires—absolutely void and without aid from the doctrine of estoppel—and that the parties could not thus "override the limitations and prohibitions of the charter." By analogy that case rules this case in favor of appellants.

See also Cook on Corp., 4th Ed., Sec. 292.

"It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction became absolutely void, could not be confirmed or ratified."

California Nat. Bk. vs. Kennedy, 167 U. S., 371.

"No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

California Nat. Bk. vs. Kennedy, 167 U. S., 368.

In Pullman Car Co. vs. Transportation Company, 171 U. S., 138, 149, this Court held a contract to be unlawful

and void "because it was beyond the powers conferred upon the Central Company by the legislature," which seems to mean that a contract ultra vires the corporation is for that reason unlawful.

In the same case, on pages 150, 151, this Court said:

> "The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield, in Holman vs. Johnson, 1 Cowper, 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

In cases of municipal indebtedness this Court has dealt with the question of the indebtedness exceeding a fixed statutory or constitutional limit, and has held excessive contracts for such indebtedness absolutely void, except where sustained under sufficient recitals, and no recitals can be sufficient which in themselves disclose that the transaction offends against the charter or statutory limit of indebtedness.

It is the settled law of this Court that a contract that is ultra vires the corporation is absolutely void, and will not be affirmatively enforced in equity as a contract. We need not inquire, under the state of the pleadings in this case, as to what might be the result of an action in the nature of a quantum meruit which would not affirm, but disaffirm the ultra vires contract, for it is enough to defeat

this suit in equity to establish the contract as ultra vires the corporation.

> "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the State Courts, in this Court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an ultra vires act. * * * No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. * * * * A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

Cal. Nat. Bk. vs. Kennedy, 167 U. S., 362.
Pull. Pal. Car Co. vs. Trans. Co., 171 U. S., 138.
McCormack vs. Market Nat. Bk., 165 U. S., 538.
U. P. R. Co. vs. C. R. I. & P. R. Co., 163 U. S., 564.
Jacksonville Ry. Co. vs. Hooper, 160 U. S., 514.
St. Louis V. & T. H. R. Co. vs. T. H. & I. R. Co., 145 U. S., 393.
Cent. Transp. Co. vs. Pul. Car Co., 139 U. S., 24.
Ry. Co. vs. Keokuk Bridge Co., 131 U. S., 371.
Oregon Ry. & Nav. Co. vs. O. Ry. Co., 130 U. S., 1.
Penn. Ry. Co. vs. St. Louis A. & Th. R. Co., 118 U. S., 290.
Thomas vs. Railroad Co., 101 U. S., 71.
Brunswick Gas. Co. vs. U. S. G. Co., 85 Me., 532.
Chewacla Lime Wks. vs. Dismukes, 87 Ala., 344.
Green Comp. Co. vs. Planters' P., 70 Miss., 669.
Davis vs. Old Col. Ry. Co., 131 Mass., 258, 270.
Nat. Tr. Co. vs. Miller, 33 N. J. Eq., 155.
Asbury Ry. Co. vs. Riche, 7 H. L., 653.
Atty. Gen. vs. Gt. E. Ry. Co., 5 App. Cas., 473.
Small et al. vs. Smith et al., 10 App. Cas., 119.

Trevor et al. vs. Whit. et al., 12 App. Cas., 409.
Ooregum Gold Co. vs. Roper (1892), A. C., 125.
Mann vs. Edinburg N. Tram. Co. (1893), A. C., 70.

SECOND POINT.

CONTRACTS THAT ARE ULTRA VIRES THE CORPORATION ARE FOR THAT REASON ALSO UNLAWFUL.

A contract that is ultra vires the corporation is for that reason unlawful, and such is the language of this Court in repeated decisions. Indeed, where the words ultra vires apply to an act beyond the power of the corporation itself in any manner, to perform, as determined by the provisions of its charter, they seem to be used interchangeably with the words "illegal" and "unlawful."

St. Louis V. & T. H. R. Co. vs. T. H. & I. R. Co., 145 U. S., 393.

Such an ultra vires contract as that herein complained of does not bind either party, and neither party can maintain an action thereon at law or in equity against the other. The appellee herein seeks affirmative relief upon an ultra vires and unlawful contract, and it is settled that the affimative aid of a Court of equity cannot be invoked upon such contracts.

St. Louis V. & T. H. R. Co. vs. Terre Haute & I. R. Co., 145 U. S., 393.

We use the words ultra vires in the sense that the act complained of is not such as the corporation could perform, and such an act is not voidable only, but wholly void, and of no legal effect.

Cent. Transp. Co. vs. Pul. Car Co., 139 U. S., 24.

The above holding has been expressly approved in many cases in this Court, notably in California Nat. Bank vs. Kennedy, 167 U. S., 368, and Jacksonville M. P. R. & Nav. Co. vs. Hooper, 160 U. S., 514, 524, 530.

A contract ultra vires the corporation is for that reason unlawful.

Pul. Car Co. vs. Trans. Co., 171 U. S., 138, 149.

> "It is the accepted doctrine of the Courts of this country and England that a contract of a corporation which is prohibited by its charter or the laws under which it is created, either expressly or by necessary implication, is considered as illegal and void, and that in passing upon such contracts the Courts have construed the meaning of the words 'illegal' and 'ultra vires' as identical."

Reese on Ultra Vires, pp. 78, 79, 80, citing English and American cases.

> "In the case at bar the contract * * * was beyond the defendant's corporate powers, and, therefore, unlawful and void, of which the plaintiff was bound to take notice."
>
> St. L. V. & T. H. Co. vs. T. H. & I. R. Co., 145 U. S., 393.

United States Circuit Judge Lurton, then chief justice of Tennessee, in the case of Miller vs. American Mutual Accident Co., 21 S. W. R., 39, 20 L. R. A., 765, in discussing the doctrine of ultra vires said (p. 769):

> "It seems to us that the true foundation of ultra vires lies in the proposition that every act of a corporation in excess of its powers is an act in contravention of public policy, and, for that reason, to be held null and void."

THIRD POINT.

CONTRACTS ULTRA VIRES THE CORPORATION ARE NOT ENFORCEABLE BY THE APPLICATION OF THE DOCTRINE OF ESTOPPEL.

The cases already cited sustain and emphasize the proposition that contracts ultra vires a corporation are not rendered enforceable under the doctrine of estoppel even where the benefits of the contract have been received and retained. It is only in an independent action on quantum meruit, without benefit from the mortgage lien, that such an indebtedness may be established.

The Supreme Court of Iowa rejected the basis on which the Circuit Court rested its opinion in the following language:

> "We cannot agree that a mortgage given by a debtor corporation on its own property was intended to be covered by this proviso. It is a matter of public knowledge that within a comparatively late period many companies engaged in the business of making loans on real estate security have adopted a method of procuring funds to invest, by which they issue their own bonds or debentures, which are placed in the hands of a trustee for sale, and which are secured by real estate mortgages taken by such companies for other loans which they have made. For something on this subject, see 2 Cook, Stockh. & Corp. Law, Sec. 777. At about the time of the enactment of this amendment, companies were operating extensively in Iowa on this system. The amount of indebtedness, where this manner of business was carefully and honestly done could not under ordinary circumstances, prejudice any person interested in the corporation; and we can see good reason for taking such companies out from under the restriction of the original section. We think this proviso applies to a class, and not to a condition; that it singles out this particular kind of corporation, and

is not meant to point out a state of affairs which it was thought might exist with any corporation."

Beach vs. Wakefield (Ia.), 76 N. W. R., 688, 694.

The Circuit Court of Appeals denied all the defenses of appellants on equitable grounds thought not to rest on the principle of estoppel, but we submit that they were in reality but an application of that doctrine. The cases which, in the judgment of that Court, defeated us, are characterized by it thus:

"They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits and repudiate the burdens of his contracts." 82 Fed. Rep., 135.

In this Beach case, to be printed as an appendix to opposing counsel's brief, the Supreme Court of Iowa substantially concurred in the opinion of the United States Circuit Court of Appeals. It said:

"The Circuit Court of Appeals, passing upon this issue in the action between these parties, said: 'Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. * * * * These decisions do not rest upon the principle of estoppel, nor depend upon the creditor's ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity; and upon the principle that he may not at the same time accept the benefits and repudiate the burdens of his contract.' We take this rule to be correct, but we conceive it to be only an indirect assertion of the doctrine of estoppel. All parties who join here in the attack on this mortgage have been benefited by the transaction; for, as we have said, the funds secured thereby were used to improve the property upon which they have their liens, or against which they make their claims. We think the plea of estoppel is good against the Terminal Company and those claiming under it; but whether we rest the holding in terms upon this

> ground, or upon the general equitable principle stated by the Federal Court, the result is the same; the cross petitioners have no standing to object to the bonds or mortgage of the Trust Company."
>
> Beach vs. Wakefield, 76 N. W. R., 688 (695-6).

The Terminal Company was held to be a railway corporation by the Circuit Court of Appeals, 82 Fed. Rep., 130. In the case of Beach vs. Wakefield, the Iowa Supreme Court likewise held the Terminal Company to be a railway company. "We think the Terminal Company was a railroad corporation."

> Beach vs. Wakefield, 76 N. W. R., 692, Div. 3.

This brings the Terminal Company clearly within such authorities as Jacksonville M. P. R. & N. Co. vs. Hooper, 160 U. S., 515, 524.

It is unnecessary to determine whether this Court will apply its decisions on the doctrine of ultra vires and estoppel to all corporations alike, for this Terminal Company is a quasi-public corporation, a railway corporation (76 N. W. R., 692, par. 3). It was organized under Chapter 139, of the Acts of the 20th General Assembly of Iowa, entitled "Union Railway Depot Law," which contained such recitals as these:

> "In order to facilitate the public convenience and safety in the transmission of freight and passengers from one railway to another, and to prevent unnecessary expense and inconvenience attending the accumulation of a number of stations in one place, authority is hereby given, etc."

to organize such corporations as the Terminal Company with the right of eminent domain. The language of this Court is so apt upon the proposition now under discussion that we repeat a brief quotation from a recent case.

> "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the right of the corporation to plead its wants of of the State Courts, in this Court it is settled in favor power; that is to say, to assert the nullity of an act which is an ultra vires act. * * * * No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.. * * * * A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."
>
> Cal. Nat. Bk. vs. Kennedy, 167 U. S., 367 (371).
>
> Pullman Car Co. vs. Transp. Co., 171 U. S., 138.

It seems to us a satisfactory answer to the position of the Circuit Court of Appeals to say that, whatever may have been the position of appellants in the State Court as to asking affirmative relief in equity, they have not sought affirmative relief in the Federal Court, and do not seek such relief here. It is the appellee in this suit that seeks equity—that seeks the affirmative aid of equity to enforce its ultra vires and unlawful bonds and mortgage.

FOURTH POINT.

THE BONDHOLDERS ARE CONDEMNED, NOT PROTECTED, BY RECITALS.

For the first time in the history of this litigation, opposing counsel will contend that he is protected by recitals, and will base that contention upon the recital of authority in the mortgage (Record, p. 142), and by the express reference in the bonds to the mortgage as a part of the contract (Record, pp. 211, 144). Each bond is numbered from 1 to 1,250 inclusive, and contains this

recital: "This bond is one of a series of bonds not exceeding in the aggregate $1,250,000." (Record, pp. 211, 144.)

Each bond contains the further provision that it is "secured by a mortgage or deed of trust duly made and delivered by the said company to the Trust Company of North America, trustee, for the holders of all of said bonds;" and also the further provision in the trustee's certificate that, "This bond is one of the bonds described in the mortgage deed of trust therein mentioned."

Counsel will rely on the recitals in the mortgage, not in the bonds. But the mortgage (pp. 140-156) contains, among others, the following recitals:

> "Resolved: That this company make and issue, in the name and under the corporate seal of this company, 1,250 bonds, of the sum of $1,000 each, amounting in the aggregate to $1,250,000, numbered from 1 to 1,250 inclusive." (Record, p. 143.)

> "First: The party of the first part shall make, execute and deliver to the party of the second part, bonds of the party of the first part intended to be secured hereby, to the amount of $1,250,000." (Record, p. 147.)

The Circuit Court of Appeals correctly found that appellee and the bondholders "had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being." 82 F. R., 133.

> "In the case at bar, the contract * * * was beyond the defendant's corporate powers, and, therefore, unlawful and void, of which the plaintiff was bound to take notice. * * * * If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in pari

delicto with the defendant. The invalidity of the contract, in view of the law of which both parties were bound to take notice, was apparent on its face."

St. L. V. & T. H. R. Co. vs. T. H. & I. R. Co., 145 U. S., 393.

Instead of containing recitals in any way helpful to appellee, both the bonds and mortgage in controversy contained such recitals as, considered in connection with the charter of the corporation and the law of the state, of which all parties were conclusively charged with notice and knowledge, disclosed to the trustee and to every bondholder that the bonds and mortgage were alike ultra vires and unlawful.

Indeed, the Iowa Court in the Beach case says of this transaction that "upon its face the act done was in excess of the charter power." 76 N. W. R., 695.

This proposition is strengthened by the fact that the bonds in controversy are non-negotiable, in that the amount required to be paid is rendered uncertain by the provision in the bonds under which the Terminal Company agrees to pay national, state and city taxes, that otherwise might be required "to be deducted * * * * from the interest." (Record, p. 144.)

The notes represented by appellants are shown by the schedule set out in the record on pages 78-82. These notes were sold to different Eastern parties, but never in amounts larger than $5,000. Such a note did not disclose any other indebtedness whatever, and each taker was ignorant of the fact that other notes were out. Moreover, these then unsecured notes took up other like earlier notes in a continuous line of indebtedness, reaching back of the bonds and mortgage. Not only are the notes

of appellants, and the indebtedness represented thereby, finally adjudicated (Record, p. 83), but the validity of the indebtedness is admitted by appellee (Record, p. 62, 243-4, 233,242,245). The appellants are the only bona fide creditors of the insolvent Terminal Company, and are entitled to priority in payment over these ultra vires and unlawful bonds, whose holders are in pari delicto. As against such guilty bondholders, equity should hold the property of this insolvent Terminal Company (not only insolvent now, but always so during and prior to giving the assailed mortgage), in the nature of a trust, and in priority for appellants as the only bona fide creditors.

Taylor on Corps., 4th Ed., Secs. 272-3.
Bk. of Chattanooga vs. Bk., 9 Heisk. (Tenn.), 408.
First Nat. Bk. vs. Kiefer Co., 95 Ky., 97.

FIFTH POINT.

THE BONDHOLDERS ARE IN PARI DELICTO.

By the authorities already cited, it is clearly shown that lenders of money to a corporation, limited by its charter in respect to the amount of indebtedness that it may incur, are put upon inquiry as to whether that limit is being exceeded or not, and must ascertain that fact at their peril.

Robbins' Law of Mortgages, p. 274.
Chapleo vs. Brunswick Bldg. So., 6 Q. B. D., 696.
Ex parte Watson, 21 Q. B. D., 305-306.
Lady Wenlock vs. Riv. Dee Co., 10 App. Cas., 354.

We do not need to go so far in this case, however, as do those authorities, for the reason that the bonds and

mortgage on which appellee seeks affirmative relief both disclosed to said appellee, and to every bondholder, by their express terms, that they were ultra vires the corporation, and unlawful; that they carried an indebtedness twice the size the corporation might lawfully incur. In such a case the parties are in pari delicto.

> "The general rule, in equity, as at law, is in pari delicto potior est conditio defendentis; and, therefore, neither party to an illegal contract will be aided by the Court whether to enforce it, or to set it aside. * * * *
>
> When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a Court of law nor a Court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. * * * *
>
> If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in pari delicto with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face."
>
> St. Louis V. & T. H. R. Co. vs. Terre Haute & I. R. Co., 145 U. S., 752.

Having deliberately violated the charter and the statute, these bondholders, on their unlawful contracts, should not be paid out of the funds of this insolvent corporation, until appellants, as bona fide creditors, are paid in full.

> Taylor on Corp., 4th Ed., Secs. 272-3.

SIXTH POINT.

THE MORTGAGE AND BONDS IN CONTROVERSY CONTRAVENE THE STATUTE LAW OF IOWA.

The indebtedness sued on is illegal, because it is ultra vires the corporation; but it is also illegal because it contravenes a plain prohibition of Iowa statute law. This question has already been anticipated somewhat in the argument.

The statute law of Iowa, Sec. 1611 of McClain's Code, of Iowa, reads thus:

> "Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock."

The appellee seeks the aid of a Court of equity to enforce a contract that on its face contravenes statute law. This the Circuit Court of Appeals and the Iowa Supreme Court conceded. The bonds, and the mortgage evidencing the indebtedness, are presented to the Court as the sole evidence and basis for an affirmative decree. They are made illegal by the plain prohibition of the statute, and yet the Court is asked to decree their validity and foreclosure.

"Must in no case" are the strong, plain words of the Iowa statute. We say that this mortgage is illegal because it offends against the statute; that it is also illegal because it offends against the public policy of the state as declared in the statute and at common law. The parties at their option cannot thus repeal the statute, and Courts ought not to do so. Estoppel should not become a license for premeditated violation of charters and statutes.

Opposing counsel says that there is no provision that the excessive debt shall be void, and that in the absence of such an express declaration an offending contract will not be held void. It is true the statute prescribed no penalty. Its purpose was to prohibit its violation, and not to permit its violation under penalty.

"When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

Miller vs. Ammond, 145 U. S., 426.

27 Am. & Eng. Ency. Law, p. 378, citing cases.

Litchfield vs. Ballou, 114 U. S., 190.

Cinn. Co. vs. Rosenthal, 55 Ill., 85.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

"It is a general rule of law that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

Reese on Ultra Vires, Sec. 69.

"Nor will Courts, even with the consent of the parties, enforce a contract which is in violation of a statute, although not otherwise declared void."

Reese on Ultra Vires, Sec. 69.

"So when a contract is tainted with illegality, the law will not lend its aid to either party for the enforcement of such a contract, and neither a Court of law nor of equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they have been equally cognizant of the illegality. * * * * The attempt to contravene the policy of a public statute is illegal. Nor is it necessary to render it so that the statute should contain any express prohibition of such an attempt. It always contains an implied prohibition."

Reese on Ultra Vires, Sec. 69.

SEVENTH POINT.

THE IOWA DECISIONS FURNISH NO RULE UNDER WHICH THIS COURT SHOULD DEFEAT APPELLANTS, OR ANY OF THEM.

All the Iowa decisions touching such a charter limitation on indebtedness concede that contracts for excessive indebtedness are ultra vires and unlawful. In reference to this very mortgage, the Iowa Supreme Court, in Beach vs. Wakefield, 76 N. W. R., 694, said:

> "The indebtedness for which this mortgage was given being in excess of the amount fixed by law, it remains to be seen whether complainants have any standing to attack the validity of the transaction. The rights of all these cross petitioners accrued subsequent to the making and recording of this mortgage. While Wakefield's lien, in part, is given priority over the mortgage, his contract was made and his work was done after the mortgage was made, and with full notice of it. The other complainants are the holders of an indebtedness that was incurred also in violation of the statute. The Terminal Company, which joins in the attack, has received, and still retains, the benefit of the funds obtained on this mortgage. The Circuit Court of Appeals, on appeal from the Federal Circuit Court of the case between these parties, and which may be found in 82 Fed. R., 124, affirmed the lower Court, but rested its holding upon the ground that complainants could not be heard to assert the invalidity of the Trust Company's mortgage. The general rule, as stated in Twiss vs. Association, 87 Iowa, 733, 737, is that 'where an ultra vires contract is made, and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required, in a proper action, to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice.' To like effect are the cases of Garrett vs. Plow Co., 70 Iowa, 697; Warfield vs. Canning Co., 72 Iowa, 666; Humphrey vs. Association, 50 Iowa, 607."

The Court in this quotation, in which it attempts to review and restate the effect of its own decisions, admits that the indebtedness is "in excess of the amount fixed by law;" admits that said indebtedness was incurred "in violation of the statute;" and on page 695 admits that "upon its face the act done was in excess of the charter power," and says:

> "The general rule, as stated in Twiss vs. Association, 87 Iowa, 733, 737, is that 'where an ultra vires contract is made, and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required, in a proper action to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice.' To like effect are the cases of Garrett vs. Plow Co., 70 Iowa, 697; Warfield vs. Canning Co., 72 Iowa, 666; Humphrey vs. Association, 50 Iowa, 607."

What does this mean? We submit that it means nothing more than that the party may be required "in a proper action to account," for that is what the opinion says. That a recovery may be had under proper pleadings on quantum meruit, we do not deny, but frankly admit. This, however, would not carry the benefit of the unlawful mortgage. A loan in excess of the charter limit may permit a judgment for money had and received; but no affirmative aid in equity can be given on the mortgage and bonds as contracts, for they are the unlawful agreement of the parties. But such a judgment can be had only in a proper action on an implied agreement to return the money—a mere money judgment, in this case without security, for an Iowa mortgage gives neither title nor possession, and avails nothing except by the aid of equity, which, in such cases, is wholly denied.

A further quotation from this same case, Twiss vs. Guarantee Life Association, 87 Iowa, 733, 735, will make the rule of the Iowa Court manifest:

> "We have directed our attention to the question as to whether the contract was such an obligation as the Southwestern Association was authorized to make by its articles of incorporation. If it was in excess of its power, it is void, and cannot be enforced as a contract; and while in such case, where an ultra vires contract has been partly performed, the party repudiating it may be compelled to account for whatever benefits may have been received by reason of it, yet this exception, or rather modification, of the rule, has no application in the case at bar. * * * The facts of the case bring it within the rules announced in Lucas vs. White Line Transfer Co., 70 Iowa, 542; Davis vs. Old Colony Railway Co., 131 Mass., 258."

In Lucas vs. White Line Transfer Company, 70 Iowa, 546, the Court said:

> "Where a third party makes with the officers of a corporation an illegal contract beyond the powers of the corporation, as shown by its charter, such third party cannot recover, because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders no amount of ratification by those authorized to make the contract will make it valid. * * * * *
>
> It is questionable, on the authorities, whether even the consent of all the stockholders could make the contract valid, when it was so plainly beyond the powers granted by their corporation."

Willett vs. Far. Sav. Bk., 77 N. W. R. (Ia.), 519.

We wish to emphasize the statement in the case of Beach vs. Wakefield, that the case of Twiss vs. Association, 87 Iowa, 737, states "the general rule" on the doctrine of ultra vires as applicable to this mortgage and

the bonds thereby secured, and also the other statements already quoted, that the trio of Iowa cases, on which opposing counsel and the Circuit Court of Appeals alike rest their contentions, are, in the language of the Iowa Court, "to like effect" as the Twiss case, which, as shown above, expressly quotes with approval the leading case of Davis vs. Old Colony Railway Company, 131 Mass., 258. That case cites with approval the leading English cases, and is a masterly discussion of the doctrine. We make two brief quotations from it:

> "The Court is of opinion that the agreement is ultra vires, and, therefore, no action can be maintained upon it against either defendant. * * * *
>
> Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted."

In adopting this Old Colony case (131 Mass., 258), with the added statement that the Iowa cases, on which opposing counsel rests his right to affirmative relief, are "to like effect," the Supreme Court of Iowa announces and adopts the doctrine of ultra vires in harmony with the leading decisions upon that doctrine both by the Supreme Court of the United States and the highest Courts of England. The decisions of the Supreme Court of Iowa do not furnish a precedent for the statement that "the settled law of Iowa" is at variance with the decisions of this Court or the English Courts.

As in the Old Colony case, so in the case at bar, the articles of incorporation were spread upon the public records of the County and of the State.

In this connection, and prompted thereto by the suggestion in the Old Colony case, supra, we call the Court's attention to some provisions of the Iowa Code in force at the time of these transactions:

> McClain's, Sec. 1610, provides: "Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor; the recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of recorder shall be then recorded in the office of secretary of state, in a book kept for that purpose."

McClain's, Sec. 1615, requires the same steps to be taken in reference to amendments, of which the Terminal Company had none.

> McClain's, Sec. 1612, provides for the published notice, and says it must contain a statement of "the amount of capital stock authorized, and the times and conditions on which it is to be paid in. * * * The highest amount of indebtedness to which the corporation is at any time to subject itself."
>
> McClain's, Sec. 1627, provides: "A statement of the amount of capital stock subscribed, the amount of capital actually paid in, and the amount of the indebtedness in a general way, must also be kept posted up in a like manner (posted in the principal place of business and be subject to public inspection); which statement must be corrected as often as any material change takes place in relation to any part of the subject matter of such statement."
>
> McClain's, Sec. 1962, applicable to the Terminal Company because it is a railroad, provides: "Every

such corporation shall, annually, under the oath of the president, in the month of January, make a full report of the condition of its affairs to the secretary of state, and shall have the same published in some newspaper printed in the place of its general business office, showing the amount of the capital stock of such corporation, and the amount paid thereon, the amount of bonds issued, and how secured, and all other indebtedness."

McClain's, Sec. 2034, provides for a report to the governor, "first, the amount of its capital stock. * * * * Third, the amount of its funded debt, and the rate of interest. * * * * Fourth, the amount of its floating debt."

The facts of notice and knowledge, pertinent to our inquiry in reference to the Terminal Company, were, therefore, easily ascertainable by a reference to public records equally accessible to all, and these sources of information can only be ignored by those who purpose to deal with a corporation at their peril. The mortgage itself was recorded long prior to the sale of the bonds.

As opposing counsel will contend that the Iowa cases forestall adverse action by this Court, they may be further considered.

In the case of Humphrey vs. Patrons Mercantile Association, 50 Iowa, 607, the contract was not in fact contrary to the statute, nor even to the amended articles. That case, on page 612, expressly excludes a determination of the question involved in this case. Even without the amendment, the innocence of the creditor is regarded as important. 70 Iowa, 547.

In Garrett vs. Burlington Plow Company, 70 Iowa, 697, the indebtedness did not, as a single item, exceed the charter limit. The question of an indebtedness made up of separate and single transactions, each in and of

itself within the limitation, may be distinguished from a lump indebtedness positively violative of the statute. In that case, also, the mortgage was given as a subsequent transaction to secure, not a single excessive indebtedness, but an excessive indebtedness created by piece-meal, no part of which singly proclaimed the violation of the charter or the statute.

In Warfield vs. Marshall Canning Company, 72 Iowa, 666, the mortgage was given subsequently to the incurring of the indebtedness, and the indebtedness may have been made up of separate items, each within the charter limit, and all of the indebtedness was within the limit of the authorized capital stock. This case emphasizes the good faith of the creditor (701) for whom this subsequent mortgage was made; but good faith is destroyed under an unlawful contract where the parties are in pari delicto. Good faith cannot rest on violation of the charter, violation of the statute, and violation of public policy, knowingly and deliberately entered upon.

It is evident that the use of the word ultra vires in this case (p. 672) is an inadvertence, as shown by the authority cited, and at most evokes the doctrine of estoppel as to a strictly private corporation, and that on mere dicta, for in this case no indebtedness was enforced, nor was affirmative relief granted to any party.

We do not admit that it follows from these Iowa cases that a mortgage given to secure bonds which in a present and single indebtedness proclaim their own violation, not only of the articles of incorporation, but also of the statute of the state, will be enforced affirmatively by the Court. If the parties acting together, can knowingly and deliberately repeal the statute, and the Courts will recognize the repeal by affirmative action, then the legislature is no longer supreme.

The Trust Company voluntarily chose the Federal forum for the foreclosure of its mortgage, but was made an unwilling defendant in this case of Beach vs. Wakefield, 76 N. W. R., 688, pending in the State Court for the foreclosure of mechanics' liens on the Terminal property, and by cross petition asked the State Court to rank its lien, but nothing more. Appellants were also made unwilling parties to the mechanics' lien suit in the State Court, and were compelled therein to affirmatively assail appellee's mortgage and bonds by cross petition. The foreclosure case in the Federal Court contains no reference to, nor record of, the suit in the State Court. After the cases were at issue, appellants herein endeavored to hasten a decision in the Federal Court, and requested the State Court to withhold its decision until the case should be determined in this Court, but this appellee resisted, and insisted that the State Court should establish and rank its mortgage lien. The State Court (76 N. W. R., 693) recognized, as to these appellants, the propriety, if free so to do, of leaving the question for prior determination by this tribunal, whose equity receiver now has the possession of the mortgaged premises. Since appellee will constantly refer to the decision of the State Court, this explanation is thought necessary. Although the issues assailing the validity of the mortgage and bonds were first made in the Federal Court, the two cases have proceeded together, but the State Court has made the more rapid progress. The most that can be said of that case is that it has a persuasive force in this Court. Indeed, the Iowa Court has not yet entered any decree on said opinion. The case in the State Court is now pending on petition for rehearing, filed by these appellants, who have again asked, and have reason to expect, that the State Court will withhold its decision on the rehearing until after the decision of the case by this Court.

The case of Beach vs. Wakefield, 76 N. W. R., 688, 694, is the first declaration of the Iowa Court applying the doctrine of estoppel to contracts that are ultra vires the corporation, and make disclosure of that fact upon their face. That case, in its final analysis touching the question of the charter limitation, admits that the contracts are ultra vires the corporation and unlawful, but denies these appellants relief under the doctrine of estoppel. The Iowa Court refused to affirmatively decree the bonds and mortgage invalid, because appellants had not the necessary standing therein to assail the bonds and mortgage, in that the Terminal Company had received and retained the proceeds of the bonds. There is a world of difference between the request of appellants for an affirmative declaration by the Iowa Court against the validity of the bonds and mortgage, and their negative position in this case, where the bondholders seek affirmative equitable relief upon their ultra vires and unlawful bonds.

The case of Beach vs. Wakefield turns, in so far as the violation of the charter limit is concerned, upon the application of the doctrine of estoppel to an admittedly ultra vires contract. In so far as the Iowa Court construes the Iowa statute or the charter, it concedes that the transaction offends against both, and is ultra vires and unlawful. The Iowa Court refuses to permit appellants to destroy the mortgage by applying the doctrine of estoppel to ultra vires contracts, a doctrine that is not grounded in the Iowa statute nor in any local law or settled rule of property. The doctrine of ultra vires is of as world-wide application as is the law of commercial paper. In the repeated applications of this doctrine by this Court, in the cases hereinbefore cited, it has been free to speak its own views regardless of what the State

Courts, whence the cases arose, may have determined. The decisions, therefore, of the Iowa Court furnish no rule of decision for, and are not binding upon, this Court.

It is said in Beach vs. Wakefield, 76 N. W. R., 694, in reference not to the charter limitation but to the prohibitory statute, that only the State can complain. The statement is sustained by reference to a Pennsylvania and California case, and not by any previous decision in Iowa. This declaration is manifestly limited, for it is quickly followed by the statement that "the Terminal Company should make restitution before it has standing to complain," showing that the statement is, after all, to be construed in the light of and controlled by the single principle of estoppel under benefits retained. Otherwise the Terminal Company could not complain even after it had made restitution. This case, even if it covered the questions involved on this hearing, would be only persuasive, for it is too recent to be binding. This case discusses the provision of the statute rather than the limitation of the charter.

But it is not, and never has been, the doctrine that the State is the only party that can challenge contracts ultra vires a corporation. Every case cited from this Court refutes that doctrine.

Thompson on Corps., Sec. 6034.
Taylor on Corps., 4th Ed., Sec. 297.

As showing that the enforcement of ultra vires bonds will not rest on any construction of the Iowa statute, but only, if at all, upon a misunderstood and misapplied equitable doctrine, the language of the Iowa Court, in Des Moines Gas Co. vs. West, 50 Iowa, 27, may be cited:

> "It is also insisted that the original articles of incorporation of the Gas Company prohibit indebted-

ness to exceed twenty-five thousand dollars, and that the amendment thereto, having been made without authority is void. The bonds were issued in violation of the charter of the company and are therefore not valid."

MOREOVER ALL THE IOWA CASES PREVIOUS TO BEACH VS. WAKEFIELD (WHICH IS NOW PENDING ON REHEARING) RELATE TO PRIVATE CORPORATIONS AND NOT TO QUASI-PUBLIC CORPORATIONS.

The Terminal Company has the right of eminent domain by statute, under which it seized real estate in the heart of the city of Sioux City for a location (Ch. 139, 20th G. A.; Code, Sec. 2100), and is a railway company in which the public is vitally concerned (82 F. R., 130; 76 N. W. R., Div. 3).

Contracts ultra vires strictly private corporations are, in some states, enforced on the contract. Contracts ultra vires strictly public corporations are not enforced either on the contract or on quantum meruit. The rule as to contracts ultra vires quasi-public corporations should at least require disaffirmance of the unlawful contract and only permit a recovery quantum meruit on proper pleadings.

Some Courts enforce the doctrine of ultra vires more strictly against quasi-public than against ordinary private corporations. The public is interested in the acts and operations of railroads, and in keeping them solvent and going concerns; that is especially true of railway companies of the character of the Terminal Company.

Cook on Corps., 4th Ed., pp. 12, 1370-7, Secs. 681, 891.

Cent. Trans. Co. vs. Pull. Car Co., 139 U. S., 24.

J. Ry. Co. vs. Hooper, 160 U. S., 514, 524.

EIGHTH POINT.

THE ENTIRE ISSUE OF BONDS IS VOID.

It is settled that the bonds will not be held valid in part and void in part. They are all void. The Court will not search to ascertain the excess, but will smite the whole issue. The vice cannot be eliminated from the contract by scaling down the bonds. This has been expressly held.

Hedges vs. Dixon Co., 150 U. S., 182.

The law will not be nice in searching out whether some part of an illegal contract may be separated from the rest and be held as valid and legal, but will condemn the contract as a whole, every part of which partakes of the illegality under a deliberate and common purpose to violate the statute. The bondholders are participes criminis. "The holders of the bonds and agents of the city are participes criminis in the act of violating the prohibition."

Litchfield vs. Ballou, 114 U. S., 190.

The limit of indebtedness, at the time the bonds were sold, had not only been reached but was then exceeded. (Record, p. 119; 82 Fed. Rep., 135.) For this reason also not a dollar of the bonds could be legal.

The indebtedness represented by appellants is admitted by stipulation to be valid. (Record, p. 62.) This admission carries with it every fact essential to the validity of appellants' debt, which, in point of time by renewals, reaches back of the assailed bonds. None of the bonds, and no part of any single bond, is shown to be valid, while the validity of appellants' indebtedness is admitted by stipulation as well as finally adjudicated by

the judgment of the District Court of Iowa. (Record, p. 83.)

Since the bonds are illegal and every bondholder a participant in violated law, appellee cannot (even if otherwise free so to do) claim that the bonds are valid up to the limit permitted by the full amount of authorized stock. Appellee will contend that the charter limitation refers to authorized stock without regard to the amount of stock issued or paid up. This is doubtful in any case.

4 Thomp. Corps., Sec. 5705, Note 3.

In this case, however, the charter excludes authorized capital stock from measuring the limit by the provision that the indebtedness "shall not exceed two-thirds of the paid-up capital stock." (Record, p. 191.) The published notice of incorportion provides that, "All the stock issued is to be paid for in cash at the time the same is so issued, and the paid-up capital stock of said company may be increased from time to time upto the amount of the authorized capital." (Record, p. 194.) When the bonds and mortgage were executed, not to exceed $200,000 of stock had been issued. (Record, p. 193.) The record, pages 224-5, shows that on February 22, 1890, the stock had just been subscribed, but not yet issued. Gratuitous city franchises were used as a subterfuge to get the stock of the Terminal Company out. (Record, p. 200, 184.) But again we say that this question has become immaterial under appellee's own evidence, which shows that the debt limit was already exhausted when the bonds were sold. (Record, p. 119.) As bearing on the question that the entire issue of bonds is void, we cite:

Hedges vs. Dixon Co., 150 U. S., 182.

Holliday vs. Hilderbrandt, 97 Ia., 177.
Ind. Dist. vs. Soc. Sav., 67 N. W. R., 370 (Iowa).
Anderson vs. Orient Ins. Co., 88 Ia., 579.
Litchfield vs. Ballou, 114 U. S., 190.
Doon Township vs. Cummins, 142 U. S., 366.
Crogster vs. Bayfield Co. (Wis.), 74 N. W. R., 635.

NINTH POINT.

APPELLANTS TENDER EQUITY.

If the bonds and mortgage are held to be ultra vires and wholly void, this Court will so declare, and will refuse affirmative aid to appellee, in which event appellants' tender of equity will not be considered. The Court will declare the law of the case regardless of the tender. If, however, our view of the law of ultra vires is not sustained, and the case is to be determined on relative equities, and the contract enforced by the application of the doctrine of estoppel, then the tender becomes pertinent. Opposing counsel has intimated that a Court needs no inducement to declare the law. We concur. But if the assailed contracts are voidable only, as counsel contends, then to stay their affirmative enforcement, a tender to do equity as a basis of receiving equity, may be pertinent.

And so, if the Court regards this as a proper case for determination under equitable principles, and for a tender of equity, then these appellants, in behalf of the indebtedness they represent, offer to waive all benefit of liens, if appellee will do likewise, and to share pro rata in the proceeds of the Terminal property, all without benefit of security. The Terminal Company joins in this tender as it does in all defenses. Will appellee accept the tender? If not, then the Court

may, if it considers the offer and its enforcement essential to the destruction of the mortgage contract, enforce the same even though the appellee should not voluntarily accept it. There is, of course, no claim that the Terminal Company has ever received the face of the bonds.

Appellants made a similar tender in the Circuit Court and in the Circuit Court of Appeals (Record, p. 314, 316), and do not withdraw from the position taken in their brief and petition for certiorari. The controversy between the noteholders and the bondholders is in reality one between non-residents of Iowa. (Record, p. 75-84.) The noteholders are bona fide creditors. The bondholders stand in pari delicto. The noteholders should be first paid in full. Equity requires this, but appellants make a better offer.

Taylor on Corps., 4th Ed., Secs. 272-3.

We ask the Court to consider the interests of the several appellants independent of each other.

The Terminal Company: Counsel claims that the Terminal Company received the benefit of the sale of the bonds. On this point the evidence is not clear, for witness Hornick says that the proceeds of the bonds went to take up syndicate notes, and if this is true, the Terminal Company received the benefit of only a small part of the bonds. (Record, p. 182.)

As to Hubbard, Trustee: The evidence shows that Hubbard has a trust deed (Record, pp. 233-242) upon all the Terminal properties to secure $718,000 of notes (Record, pp. 78-82 shows part of them), which

were sold to numerous different parties without disclosing that other like notes had been sold.

As to the Credits Commutation Company: This company is a judgment creditor of the Terminal Company for $616,500 of said notes in principal and $75,596.95 as interest. (Record, p. 83.) Should the lien of the Trust Company of North America be held non-enforceable, this judgment would become a first lien. Moreover, the indebtedness represented by this judgment and by the trust deed to E. H. Hubbard, trustee (the former being included in the latter), is admitted by the Trust Company of North America to be valid. (Record, p. 62).

The Trust Company of North America in the Circuit Court of Appeals got nothing except from the grace and bounty of equity. Appellants' offer means equality, and equality is equity.

Respectfully submitted,

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No. 192.

Brf. of Coombs & Taylor for Appts

APPELLANTS' REPLY BRIEF.

Supreme Court of the United States.

Filed Jan. 23, 1899.

OCTOBER TERM, 1898.

No. 192.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company,

Appellants,

vs.

TRUST COMPANY OF NORTH AMERICA,

Appellee.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JOHN C. COOMBS, 25 Equitable Building, Boston, Mass.,
HENRY J. TAYLOR, Sioux City, Iowa,
Solicitors and of Counsel for Appellants.

Supreme Court of the United States.

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SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company,

Appellants,

vs.

TRUST COMPANY OF NORTH AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

In the limited time between the filing of appellee's argument and the hearing, we cannot assume to more than notice a few of the statements therein and that only to correct errors.

1. Counsel says in his brief, page 7, that the record does not disclose whether or not the capital stock was increased by amendment to the charter. There never was any attempt to amend the charter in this or any other regard. The charter was introduced by appellants. (Record, 189–192.) The Record (193–5) shows the recording, notice, etc. The steps essential to amendment are shown in the articles (Record, p. 191, Art. 16) and in the statute (appellee's brief, p. 34). The records (189–227) of both directors and stockholders, meeting by meeting, are given. No attempt

to change the charter is shown. Counsel admits, what the records show, namely, that the S. C. & N. R. R. "is the sole and only stockholder" (save qualification shares) and this is shown to be one million dollars only. (Record, pp. 164, 178, 180-1, 197, 200, 204, 225-6, 171.) The evidence shows that one million dollars is *all* the stock of the Terminal Co. (Record, pp. 180-1, Art. 4 on 190, 192, 193, 194, 195, 137.)

2. Counsel insists in his brief, pages 21–3, that the Court shall assume an amendment increasing the authorized stock to two million. The evidence shows the fact to be that the highest amount of authorized capital stock was only one million. There is no room for presumption. The charter stood in the way of any increase. The evidence shows no attempt to increase the stock.

In the Handley case cited by counsel, page 22, the charter already authorized the increase, and the increase was in fact made, but in an irregular manner.

The position of counsel is absurd. Suppose a cemetery association is prohibited from issuing life insurance policies, and yet its officers in its name issue a thousand of them, counsel would say that the cemetery company would be bound, because the stockholders under forms of law might have taken steps to strike out the prohibition and insert insurance powers, and that it would not be material what the fact was, for the presumption would control the fact. This cannot be so as to a charter power, for the party dealing with the corporation is charged with the knowledge of the limitations of charter. Appellee relied on no attempted change, and was not misled. Its president knew that the authorized stock was only one million. (Record, 137, Appellants' Brief, p. 16.)

The presumption of knowledge of the limitations of the charter is conclusive.

3. Counsel refers to a second mortgage "subject to the lien of said prior deed of trust". (Appellee's brief page 5.) The status of this mortgage should be shown. It is set out on pages 15–18 of the record. There is no evidence fixing the exact time when this so-called second mortgage was taken by the Union Loan & Trust Company. The mortgage itself purports to have been signed and acknowledged on the 24th day of April, 1893, the very day the Union Loan & Trust Company voted to make its assignment for the benefit of creditors, which it actually did on April 25, 1893. The mortgage was not made to secure any of the Terminal notes that had been negotiated through said Trust Company and that make up the notes represented by the Credits Commutation Company or Hubbard, Trustee (Record, pp. 78–82), nor the notes mentioned in the stipulation of the parties (Record, pp. 243–4), but said mortgage purports to secure other notes *of even date therewith*. No such notes were ever negotiated. None of the notes in controversy bear even date with the mortgage, but a much earlier date.

The interests represented by the appellants do not rest in any manner upon said alleged mortgage, nor can said alleged mortgage conclude nor preclude the appellants from any of these rights under the issues in this case.

The first twenty-four pages of the printed record refer to an old suit brought by only a half dozen banks for the foreclosure of said alleged mortgage, and the very most that can be gotten out of that mortgage is a prejudice, if any, to the notes represented by such banks. If all of those notes should be held to be prejudiced by said procedure it would reduce the indebtedness of E. H. Hubbard, Trustee, by only a few thousand dollars, if indeed any of said notes could be shown to be therein included. As that is the most and the worst that can be urged because of the alleged

second mortgage, its concession, if necessary, leaves our rights intact and the amount of the claim of the creditors practically unchanged. The Court of Appeals speaks, in the fifth division, of determining the " rights of the owners of these notes under their second mortgage of April, 1893 ". But no such rights are asserted, and, with the exception of the first suit on the part of said six banks, no rights have been asserted under either said mortgage or said notes, and the court in making the statement that any rights thereunder were before it for adjudication lost sight of the issues, for neither the mortgage nor the notes thereby secured are in any manner presented for determination. The old suit by said six banks was at once abandoned. Entirely different notes are involved, and in no manner do they rest, nor is it claimed that they rest, upon the second mortgage, nor is there any testimony that the second mortgage was made for their benefit, nor that the noteholders in question ever knew of or accepted the same. The allegations of the petition of those six banks is all that there is in this case touching this matter, and that petition was never introduced in evidence. For what purpose the second mortgage, referred to in the Court of Appeals, and evidently wholly misunderstood, was executed and delivered, if any delivery was made, is not shown. Even if it was formally handed into the Trust Company on the day before its failure and on the very day it voted to assign, it cannot be held to prejudice the rights of creditors who neither knew anything of it nor will have anything to do with it. It was not competent to thus validate an *ultra vires* contract. No bondholder is shown to have relied on or to have even known of said alleged mortgage. Neither appellants nor appellee were injured or benefited thereby or in fact knew thereof.

4. On page 11 of his brief counsel refers to a provision

first appearing in the Code of 1897, which went into effect October 1, 1897. This was years after this suit was begun and was even after the Court of Appeals had rendered its decision herein. Counsel uses it only as an aid to his interpretation, but it seems to us to have the opposite force and to be in fact immaterial in this suit.

5. Counsel asks a *quantum meruit* (Brief, 23-4) recovery with benefit of the mortgage lien. He admits that the full amount of no bond was ever paid to anybody, but claims that $1,137,500 were received by the Terminal Company on the entire bonds.

There were no pleadings for such a recovery, but only "on the bonds" (Record, 39).

The mortgage purports to secure only the "bonds."

It is not shown that the bondholders are assignees of any implied debt but of only an aggregate of nothings—"bonds."

Even if the bonds were negotiable in form the mortgage is a part of the agreement of the parties, and must fall with the bonds. It secures only the "bonds", not the implied debt. Equity will not aid the parties on their contract, but, if at all, only on a contract *implied* by law. The law does not imply a mortgage to secure the implied debt. Equity is not thwarted by such a subterfuge. Equity will not thus assist the party upon the unlawful contract.

6. Counsel insists that on October 11, 1898, the Iowa Court, in a suit not made a part hereof in the pleadings, held this mortgage to be voidable only in a suit by the State. This statement did not refer to the charter, nor to any provision in the statute. To kill the debtor is to bar all remedy. Even if the Iowa case is to be given that force, it is too recent to control this. No previous declaration to that effect had been made. It expressly rests on no previous Iowa case. The context shows that the Court limits this statement by giving the Terminal Company standing on making

restitution. The language may not be apt but it becomes only a statement of the estoppel argument. The language of the statute is a strong prohibition. The real appellants and appellee are non-residents of Iowa. The appellants in the Iowa case are all held by that Court to have sought affirmative relief, and the Credits Commutation Co. plead no judgment therein, but here the appellee pleads a violation of both the charter and the statute as a basis for equity and the position of appellants is only negative. For such changed positions the Iowa case is *dicta*. Not only the statute but the charter imposes the prohibition. The bondholders are *in pari delicto*. The Terminal Company is a quasi-public corporation in which the public has great concern. The Iowa Court expressly finds (appellee's brief, p. 45) that "upon its face the act done was in excess of the charter power"; that the indebtedness was "in excess of the amount fixed by law" and was incurred "in violation of the statute" (76 N. W. R., 694); that the Twiss case (87 Iowa, 737) states the general rule and that "to like effect" are the Iowa cases relied on by counsel. The Twiss case (87 Iowa, 735) approves the rule of *ultra vires* laid down in Davis *vs.* Old Colony Ry. Co., 131 Mass., 258. In Gas Co. *vs.* West, 50 Iowa, 27, speaking of bonds in excess of the debt limitation, the Court said: "The bonds were issued in violation of the charter of the company, and are, therefore, *not valid*". Let us put two sentences side by side and look at them again. In the Twiss case (87 Iowa, 735), so accepted by the Iowa Court as stating the rule of all its past decisions, it is said: "If it (the act) was in excess of its (charter) power it is void and cannot be enforced as a contract". Of this Terminal mortgage the Iowa Court said: "Upon its face the act done was in excess of the charter power" (76 N. W. R., 695). Then why does it not also follow that this contract in

controversy "cannot be enforced *as a contract*"? That would seem to be the only logical conclusion, and is made more emphatic by the adoption of the case of Davis *vs.* Old Colony Ry. Co., 131 Mass., 258. Moreover, this Iowa case is now pending on petition for rehearing without a decree of affirmance, and that Court will doubtless give respectful consideration to the decision of this Court.

TERMINAL COMPANY HAD NO AUTHORITY TO MORTGAGE ITS PROPERTY.

In the haste of closing our brief one assignment of error is not clearly stated, and there should be added at the close of the first paragraph on page 8 thereof:

> It is against public policy and against the laws of Iowa to permit said Terminal Company to mortgage either its real estate or its franchises owned at the time of said mortgage or subsequently acquired; that said Terminal Company had no authority by law to mortgage its property. (Record, pages 273, No. 2; 274, No. 10, 66, 73.)

We refer the Court to pages 37–46 of our Petition for Certiorari and to pages 22–3 of our Brief supporting said petition for printed copies of the Statutes relied on and for our argument on this assignment, and ask the Court to make the same a part of our first brief by this reference.

In the opening paragraph of appellee's brief, the Terminal properties are described as "consisting of about a mile and a quarter of railroad in the heart of the city and certain lots and blocks on which were situated passenger, freight depots, elevators, warehouses, etc." Under the first *proviso* (appellants' brief, p. 5) railroad companies are excepted from that section, 1611 (record, p. 5), so far as to allow them to contract indebtedness for construction and equip-

ment to the amount of $16,000 per mile which would authorize a total bonded indebtedness of only $20,000 for construction and equipment, and yet the "railroad" is included in this mortgage for a million and a quarter. It is evident from the mortgage (142-3) that the loan is for this terminal property "within the limits of Sioux City", so that even if the Terminal Company should not be limited to $16,000 per mile by the first *proviso* to section 1611 (appellants' brief, p. 5) this mortgage violates the limitation of both section 1611 and said first *proviso* and so violates public policy by offending against each indebtedness and the aggregate of both. We think it was never intended that this Union Depot property should be burdened by a mortgage at all and least of all upon an unbuilt railroad. This excessive mortgage does disable the corporation from performing its duties to the public even if that result is not brought about at once.

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